No. 14,705

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
Appellant,

vs.

BRADLEY MINING COMPANY,
Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho, Southern Division

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SUMMARY STATEMENT

On July 12, 1951, plaintiff and appellant, United Mercury Mines Company, an Idaho corporation, commenced this action in the United States District Court for the District of Idaho, Southern Division, against Bradley Mining Company, a California corporation, defendant and appellee. The complaint was founded upon an instrument dated December 31, 1941 (R. 12 ff) and provided for the payment of royalties upon minerals extracted by appellee from property conveyed to appellee by appellant. The conveyance provided three methods for the computation of royalties based on

"net smelter returns", "net revenue" and "net mint returns". Some years after the execution of this conveyance, appellee built its own smelter and the present action arises because of contentions of appellant as to the method to be used in computing royalties upon concentrates processed by appellee's smelter.

The royalty computation provisions in the agreement between the parties referred to herein are as follows (R. 17, 18):

> "By net smelter returns, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted.
>
> "By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho.
>
> "By net mint returns, as used herein, is meant the amount paid by any United States Mint, branch or agency thereof, less all shipping and marketing costs from Cascade, Idaho."

Related to the foregoing is the following provision:

> "Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works."

Appellant's complaint (R. 3 ff) requested an interpretation that the "net revenue" clause should be the basis for

royalty computation without regard to smelting charges and costs.

Appellee's answer—and affirmative defense (R. 41 ff)—alleged that the royalty computation should be based on the "net smelter returns" provision; that appellee had constructed the smelter at a cost of more than $2,000,000.00; that appellee was entitled to "deduct its normal smelter charges" as provided in the agreement, and that to adopt appellant's interpretation of the agreement would unjustly enrich appellant.

On October 10, 1952 (R. 136-140) and on April 9, 1954 (R. 164-166), in connection with certain proceedings hereinafter more fully referred to, the trial court in its two memorandum decisions ruled against appellant's claimed interpretation of the royalty provisions and rejected the "net revenue" clause as the controlling basis for royalty computation.

Thereafter, at a pretrial conference (R. 197-221), duly noticed and held on February 1, 1955, the trial court reiterated and affirmed its earlier interpretation and rulings, thus disposing of the only pending issue of law (R. 199, and see admission by appellant in its brief, page 4). As the transcript of the pretrial conference will disclose appellant not only stated that it had but one theory for proving its case (already rejected by the trial court), but also elected not to reserve any questions of fact for a trial. Accordingly, the trial court rendered a judgment of dismissal (R. 189).

STATEMENT OF THE CASE

It is respectfully suggested by appellee that the statement of the case as it appears in appellant's brief ignores or obscures the controlling facts in the record brought here for review. Appellee, therefore, is unwilling to accept the state-

ment as presented by appellant, and elects to set forth what it hopes will be a concise and consecutive statement of the facts, and the occurrences as they took place in the lower court.

From 1927 until December 31, 1941, appellant was the owner of certain mining claims in the State of Idaho. During all of those years appellee and its predecessors in interest, occupied and possessed said mining claims under a series of agreements with appellant, which permitted the mining of said property by appellee in consideration of the payment by it to appellant of certain specified royalties (R. 53).

During those years the material mined from the property was and continues to be low grade gold ore and low grade antimony ore. The ore so mined was concentrated upon the ground and the concentrates resulting were then shipped and sold to smelters. Concentrates valuable principally for their antimony content were sold to antimony smelters, and concentrates valuable principally for their gold content were sold to gold smelters (R. 58, 59).

Sums received by appellee for such concentrates were deemed by the parties to be and were treated as bases for computing royalties payable to appellant by appellee (R. 63).

On December 31, 1941, a new agreement was entered upon between appellant and appellee. That agreement, attached to appellant's complaint, as Exhibit I, appears in the record beginning on Page 12. It is the basis for appellant's claim for recovery in this proceeding. By the terms of that agreement appellee became the owner of the mining claims described therein subject to the obligation to pay royalties to appellant for a period of 999 years in the amounts and upon the terms and conditions in said agreement specified.

Those specifications will be made the subject of detailed discussion later herein.

Following December 31, 1941 and until August of 1949 business continued between the parties to said agreement substantially as before. Appellee continued to mine low grade ore, to concentrate the ores and to ship the concentrates to smelters and other purchasers as the values in the concentrates might dictate. Upon receipt of smelter returns royalties were computed and paid by appellee to appellant. No claim is here made that anything is due from appellee to appellant on account of anything occurring prior to August of 1949.

Concentrates shipped by appellee to antimony smelters contained some gold, and likewise concentrates shipped to gold smelters contained some antimony. Both types of concentrates contained some impurities which somewhat complicated the smelting processes and resulted in the assessment of penalties against the product. Gold smelters would not pay appellee for the antimony content of gold concentrates, and antimony smelters would pay little or nothing for the gold content of antimony concentrates. Antimony smelters insisted upon high grade concentrates thereby setting standards which it was difficult for appellee to meet. The foregoing circumstances limited the amount of saleable products by appellee and also reduced the returns from ores mined and sold, and consequently reduced the royalties payable (R. 60, 61).

Accordingly in 1948 appellee designed a smelter which it was thought could treat both gold and antimony concentrates, and thereby avoid the loss of gold in the antimony concentrates and the loss of antimony in gold concentrates, and which could handle the product of the mine and concentrator even though concentrates might be of a lower grade

than would be acceptable to outside smelters. Such a smelter was built upon the mining property and was put into operation in August of 1949. The cost of constructing the smelter exceeded $2,000,000.00, all of which was paid by appellee. The cost of operating the smelter exceeds the sum of $100,000.00 per month, all of which has been paid by appellee. The smelter is referred to in the record as the Yellow Pine (R. 61 ff).

The Yellow Pine went into service in August of 1949 and continued to operate until after this suit was filed. During that time it treated substantially all antimony concentrates produced upon the property, and a portion of the gold concentrates. Gold concentrates beyond the capacity of Yellow Pine were sold to a Tacoma, Washington, gold smelter. Dollarwise the total concentrates treated in Yellow Pine represented 55% of total production, and those sold to outside smelters represented 45% (R. 147, 8).

After Yellow Pine went into operation appellee continued to compute and pay royalties upon gold concentrates shipped out for treatment exactly as before. It paid to appellant 5% of net returns received by it from the smelters (R. 148). As to antimony concentrates and gold concentrates treated in the Yellow Pine smelter, appellee determined what such concentrates could have been sold for to outside smelters and computed and paid royalties upon that basis. This was the same basis followed by appellee in the computation and payment of royalties prior to that time except that after Yellow Pine went into operation certain transportation charges which had theretofore been deducted before computation of royalties were no longer deducted (R. 65).

Royalties so computed and paid were accepted by Appellant until about the time this suit was filed (July 12, 1951).

About a year prior to the commencement of the action, on July 20, 1950, the parties hereto entered upon a supplemental agreement postponing the payment of royalties (R. 66). That agreement contains this significant statement (R. 67):

> "Whereas, the said Bradley Mining Co., on the 20th day of June, 1950, paid the United Mercury Mines Company * * * the royalties due for the month of May 1950."

The foregoing was recognition by both parties that appellee was and had been computing and paying royalties in accord with the requirements of the contract of December 31, 1941, now relied upon by appellant.

In July of 1951, appellant filed its complaint in this action (R. 3-12). To its complaint appellant attached a copy of the agreement of December 31, 1941 as Exhibit 1 (R. 12-26). By its complaint appellant claims that it is entitled to have and receive royalties computed at 5% upon the amount of net smelter returns received by appellee for concentrates shipped away for smelting. Upon concentrates treated in Yellow Pine, appellant claims that it is entitled to have as royalties 5% of all amounts received by appellee for the sale of metals resulting from the smelting process without any allowance whatsoever to appellee for the cost of constructing, operating and maintaining the smelter (R. 11). Thus appellant claims the right to have royalties computed upon one basis if concentrates are shipped out for smelting, and on an entirely different basis if they are smelted in Yellow Pine.

It is important to note and bear in mind the prayer of appellant's complaint, paragraphs 1 and 2 of which read (R. 11, 12):

"That the Court interpret the provisions of said contract exhibit 1, and enter its decree herein determining and decreeing that the proper and legal method for determining the amount of royalty due plaintiff under said contract for minerals, ores, metals and values extracted from said mining claims and smelted at the Yellow Pine smelter of the defendant is by the use of 'net revenue' as defined in said contract.

"That the Court determine and declare that it is the duty of the defendant under said contract to furnish plaintiff the amount paid by purchasers from the sale of minerals, ores, metals and values extracted from said mining claims and smelted at the Yellow Pine smelter and the marketing and shipping costs from Cascade, Idaho."

The principal relief prayed for is declaratory, interpretation and construction of the agreement.

Responsive to the complaint appellee filed its duly verified answer and a motion for partial summary judgment. (R. 41 and R. 51). The motion was supported by Affidavit (R. 114) as provided by Rule 56. Appellant filed a counter affidavit (R. 114) and the motion was submitted for decision.

The Court overruled the motion for summary judgment, but, responsive to the prayer of appellant's complaint and appellee's motion, he did construe and interpret the contract. The trial court's memorandum decision of October 10, 1952, contains this:

"The plaintiff claims that Bradley intended by this contract to assume not only all expenses incurred in the operation of the mine and mill, but the costs of smelting as well in event it constructed a smelter at the property. This I surmise is an afterthought on plaintiff's part. On consideration of the contract, as a whole, I find no sufficient reason for believing that either party intended that the Bradley Company was to shoulder the cost of smelting in event it constructed a smelter on the

> ground, or, to put it another way, that the parties understood that the royalty would in such circumstances be computed under the net revenue clause, as Mr. Oberbillig's Company now contends. In my opinion certain language in the definition of the term "net smelter returns" precludes the existence of such an understanding even though the language is vague when read in the light of the practice." (R. 138)

Here was a clear interpretation of the agreement relied upon by appellant and clear rejection of appellant's contention that it is entitled to have royalties computed upon concentrates treated in Yellow Pine upon the basis of sums received by appellee for the sale of metals resulting from the smelting process. Then as now, however, appellant refused and now refuses to admit that the agreement relied upon by it has ever been construed by the trial court.

Following the memorandum decision above referred to, appellant served and filed request for admissions (R. 141), and also served and filed upon appellee certain written interrogatories (R. 149). It also filed its motion praying for production and inspection under Rule 34 (R. 156). Appellee made answer to some interrogatories; to others it filed objections (R. 151, 153).

Some interrogatories sought to elicit from appellee whether appellee had sold the finished products of Yellow Pine smelter, to whom sold, and the amount received from the sale of such products. The court having, on October 10, 1952, construed the contract as not requiring settlement upon the "net revenue" basis contended for in appellant's complaint, appellee filed its objection to the questions just referred to and filed its motion for an order limiting the scope of order for production, etc. (R. 160). Appellee's motion was made upon the ground that what it sold the end products of the smelter for was immaterial in view of

the court's construction of the agreement. The materiality of the information sought was argued to the court, and following argument the court rendered its memorandum decision of April 9, 1954, which reads (R. 164):

"MEMORANDUM DECISION

Healy, Acting District Judge.

"The matters before the court are objections to certain interrogatories directed to the Bradley Company, and a motion on its part for a protective order limiting the scope of an inspection of records desired by the plaintiff. Specifically, the interrogatories call for information as to the amount and content of products shipped and sold after reduction by the Yellow Pine smelter; the amounts of money received from the sale thereof; the names of the purchasers; and the marketing and shipping costs connected with the sales. The objection urged is that the information is immaterial in view of the court's earlier ruling as to the inapplicability of the 'net revenue' clause in the determination of the royalty payable in such situations.

"It should be understood that that ruling, made in October 1952, represents this court's settled interpretation of the contract. To put the matter more concretely, the contract affords no ground for believing that the parties intended to saddle solely upon the Bradley Company the cost of smelting in event Bradley should construct a smelter of its own at the mine and process or reduce there some or all of the concentrates, instead of shipping them as theretofore to a custom smelter. I think it clear that smelting costs were intended by the parties to be deducted before arriving at the amount upon which the royalty of 5% was to be computed, regardless of whether Bradley or some concern independent of Bradley did the smelting. As a necessary corollary, it would appear that the Bradley Company, in determining such costs, is entitled to take into

account all items or factors which would normally be taken into consideration by an independent or custom smelter in arriving at the amount of its charges or at the amount it will pay for concentrates shipped to it for smelting.

"Bradley has contended that the proper basis for computing the royalty in those instances where the concentrates are reduced at its Yellow Pine smelter instead of being shipped and sold to an independent smelter is the value of the concentrates at the mine. Further reflection leads me to believe that recourse to this basis may afford a closer, and at the same time a simpler, approximation to what was intended by the parties than any other they might devise. Nevertheless, another appropriate method would be to determine the cost of processing the concentrates at the Yellow Pine smelter, keeping in mind that Bradley as the owner of the smelter is entitled to have the status of an independent concern in a competitive field, and to determine its charges accordingly. The deduction of those charges from the amount realized by Bradley from the sale of the refined product would give the net sum upon which United's royalty is to be computed. Theoretically it would seem that recourse to either of the two methods should produce the same result.

"I think, therefore, that the information sought by United may have materiality, and the objections to the interrogatories and request for inspection are accordingly disallowed.

[Endorsed]: Filed April 9, 1954."

Following the above order, appellee made full compliance therewith. It answered all interrogatories and made all of its books and records available for inspection and copying. Appellant elected not to avail itself of the opportunity to inspect appellee's records or make any copies thereof.

Next and final occurrence of importance in the court below was the pre-trial Conference. The conference was called by the court pursuant to Rule 16, Federal Rules of Civil Procedure, and the parties were directed to be present by their counsel (R. 187). The purpose of the pre-trial conference, as in all cases, was to simplify the trial of the cause.

We earnestly submit that appellant's brief refuses to recognize what occurred at the pre-trial conference. Appellant, at the pre-trial conference, was at full liberty to reserve questions of fact for the trial, but it clearly elected not to do so and left the record so that there was nothing left for the court to do but to order a dismissal.

The only issue of law ever tendered by appellant was the meaning of the agreement of December 31, 1941, insofar as that agreement relates to the computation of royalties. That issue had been settled by the court by its memorandum decisions of October 10, 1952 and April 9, 1954. The interpretation put upon the contract by those two decisions of the court was re-affirmed and re-stated at the pre-trial conference.

During the pre-trial conference, appellant procured from appellee an admission as to freight and commission charges applicable to smelter products sales (R. 203, 4). The amount of gross sales had already been admitted (R. 166, 167). Under appellant's theory, as clearly stated to the court, these admissions left no issue of fact to be decided upon the trial.

The transcript of the pre-trial conference is preserved in the record (R. 197-214). What occurred there can be more quickly and clearly shown by quotation than by explanation. After preliminary statement the following occurred upon the pre-trial (R. 204-221).

"Mr. Breshears: I have this suggestion to make. As counsel has said, we understand that this Court has now construed the contract to mean that royalties are payable on the basis of net smelter returns, and that Bradley is entitled to be treated as an independent smelter, and deduct normal smelter charges. It seems to me that the first thing to be clarified here now in this conference is whether or not the plaintiff is going to insist upon proof as to whether or not we have properly computed and paid royalties on a net smelter basis. Their answer to our request for admissions denies that we have properly paid on the basis of the computations on our own books. They have had an opportunity, if your Honor please, to examine our books, but have rejected that opportunity. They have an order of court that has been in the files for many months. They were orally offered an opportunity to inspect the books at the last time the Court was here. Now the issue of fact that will have to be established at a trial will be, if they deny that we have paid royalties on the basis of net smelter returns—then the question of fact must be tried out, but it seems to me that they must answer the Court here now and answer us whether that is an issue in fact. If they don't deny that, there is nothing left in this lawsuit but a judgment in favor of the defendants.

"The Court: Of course, the proceedings in this case heretofore have been more or less informal. We might well have placed in the pre-trial order formally the ruling of the Court on the issue of law, which I understood to be the chief issue in this case, that is the construction of the contract. It seems to the Court that its interpretation of the contract is about as clear language as you can make it. Now there may be other questions of law, if there are it hasn't shown up so far. From here on it looks to me more or less like a matter of proceedings for an accounting.

"Mr. Ray: If we may suggest it, we would like very much to have your Honor rule on the construction of the contract as part of the pre-trial proceedings.

"The Court: I think it should be done, so it is formally in the record. That doesn't deprive the plaintiff in this case of his right to review that construction of the contract on appeal, but insofar as the District Court is concerned, that is water over the wheel. That can only be raised in an appeal in an appropriate way from the judgment that is finally entered. So it may be that there are other questions that exist, but it seems to me, that I would like to get counsel's views on that, that this is from here on really largely a matter of accounting.

"Mr. Breshears: Doesn't that depend on the question of whether or not they admit or deny whether we have paid properly on the basis of net smelter returns?

"The Court: Of course, the Court is not familiar at all with these interrogatories, or what the answers have been. The Court has had nothing to do with those. No objection to those, as I understand it, and they are in the record here. I haven't gone through them.

"Mr. Breshears: Perhaps I haven't made myself clear. At this pre-trial conference, don't we eliminate the things that are unnecessary and formulate the issues on the basis—irrespective of what the responses to the admissions are, and the interrogatories—if they admit that we have paid, the lawsuit is over, if they have admitted we have paid on the basis of net smelter returns. If they deny it, then we are to put to our proof upon that single question of fact.

"The Court: What about that, what is your answer to that?

"Mr. Clemons: If your Honor please, as I see it there are two possible means that you indicated that the defendants might submit proof, as I read your last memorandum. One was that they compute as they had alleged they have computed. In other words, they say we have computed net smelter and paid you on the same basis other smelters are computing net smelter

and paying you. I think that is one basis, that is the basis they claim they have paid. The other basis your Honor spoke about was to take the gross receipts and deduct from its reasonable smelting costs.

"The Court: I don't think the Court ever said anything about reasonable smelting costs.

"Mr. Clemons: Is entitled to have and determine its charges accordingly—I believe that is the way—determine its smeltering costs and deduct those. Now those are the two alternatives the Court said that exist. So, I don't know which one they are going to prove. I am not in a position to know myself whether or not they have correctly proven these matters—correctly reported these matters. So I think that that burden is upon them.

"Mr. Ray: May I suggest, your Honor, that the burden of proof is on the plaintiffs in this case. Now under the ruling of the Court, if upon the trial of this case he should offer evidence on the net revenue provision of the contract, the evidence would be rejected as immaterial. Now if he doesn't claim that our computations are wrong on either of the methods he just referred to, if he doesn't dispute that we have computed and paid on the net smelter returns, then there is nothing left in the case. If he says that there is an issue, if he denies that our accounting is correct under any method, then you would have that issue left to try.

* * * * * * *

"The Court: Just a moment. As regards this matter of computation on the royalties on the basis of the market value of the concentrates at the mine. I take it that the plaintiff has not admitted that you have paid the royalty on that basis.

"Mr. Ray: That is what we want to find out, if they do or do not.

"The Court: What about that, Mr. Clemons?

"Mr. Clemons: I will have to admit that they have paid us royalty. The basis upon which they have paid them, I am not prepared to admit that is the same basis that anyone else would pay. I don't know, so I cannot admit that. We know they have paid us money, yes, but as to how they have computed it, I don't think that we should be required to admit it is proper and correct way of computing it, or that it is proper at all.

"Mr. Ray: How do you propose to prove your case then if you can't either admit or deny that our computations are right? The burden is upon you. How do you propose to present your case? We would like to know so we can meet it, if you have one.

"The Court: Do you consider you have no burden of going forward at all with that proof? You are asking a money judgment here.

"Mr. Clemons: That is right, your Honor.

"The Court: As well as declaratory relief.

"Mr. Clemons: That is right. I would propose the case be proven by showing the gross amount received by Bradley Mines upon the sale of the products that went through the smelter, and from that show the deduction of freight and marketing costs, and show the amount that has been paid to us, as establishing the amount we would be entitled to.

"The Court: In other words, you think your burden is to go ahead now and establish the amount of your recovery upon the basis of your construction of the contract which the Court has rejected; is that right?

"Mr. Clemons: Yes, your Honor. I don't know of any other basis you could proceed upon. The defense would be entitled to put in their proof then.

"Mr. Ray: Then we should like to know, your Honor, whether plaintiff intends to make any proof on any other basis.

"The Court: I think that is a fair question.

"Mr. Clemons: I don't know whether I am prepared to answer that, your Honor. I thought I had—I don't know whether there would be any other theory or not myself. I have not discussed with my co-counsel on that, or with Mr.——

"The Court: One of your obligations in these matters is to prepare yourself.

"Mr. Clemons: Yes, I had attempted to, your Honor. That is the theory as I would know it, to state whether there was any other theory or not. I am just not prepared. I don't know.

"The Court: Well, it is your conception of the case that you are entitled to go ahead now on the basis of the allegations of your complaint as though your construction of the contract had been accepted, and you would make proof along that line. Is that your idea of trying this case?

"Mr. Clemons: Yes, your Honor, I would say that was our idea in trying the case.

"The Court: On that basis the evidence you offered would be rejected by the Court as immaterial and irrelevant.

"Mr. Clemons: That would be our theory of the trial as I understand it.

"Mr. Ray: Then we are to understand you would offer proof on that basis and no other basis?

"Mr. Clemons: Mr. Ray, that is the only basis I have in mind at this time. If there is another basis, I am not aware of it, but I would hate to bind ourselves at this time that that is the only theory.

"The Court: In other words, you still adhere to the theory that you are entitled to have royalties paid based on the net revenue clause of the contract.

"Mr. Clemons: Yes, we would answer that in the affirmative, your Honor.

"The Court: So then you are prepared to accept a non-suit so far as this case is concerned, is that right, or dismissal?

"Mr. Clemons: Before I would answer that could I have a few minutes with my client, and I would also like to make a telephone call.

"The Court: We will be in recess until 11:30, is that long enough time?

"Mr. Clemons: I hope it will be.

"The Court: Or we can adjourn until one o'clock, until you get this matter settled in your mind. You might discuss it with your associates, you have several other lawyers in the case.

"Mr. Clemons: Yes, they were not available for today. Then with your permission I would ask that we continue this until one o'clock.

"The Court: All right, we will recess until one o'clock. (Whereupon a recess was taken.)

Afternoon Session, Feb. 1, 1955, 1:00 p.m.

* * * * * * *

"Mr. Clemons: Before recess the Court requested me to advise the Court as to the theory upon which this case will be tried by the plaintiff. I had expressed the view—my understanding of how the case would be presented, to which your Honor said that was a net revenue theory, which it is ostensibly, and I was asked if I had any other theory. I might say to the Court at this time, I have checked with my co-counsel and I am authorized to say that that is the theory as stated by me which would be the theory upon which we would present the case.

"Mr. Ray: Are we to understand then from your statement upon the trial that you would not offer any evidence upon any other theory?

"Mr. Clemons: We would not offer any evidence in the trial of any smelting costs, or any costs other than those which I outlined this morning.

"Mr. Ray: This morning you said upon the trial you would introduce your contract, show what we received from the sale of the end products, you would deduct the freight and sales expenses, and ask the Court to arrive at the royalty by multiplying that result by five per cent.

"Mr. Clemons: And giving credit for what we have received.

"Mr. Ray: And you will offer no evidence on any other theory?

"Mr. Clemons: That's our position.

"The Court: I take it then, Mr. Clemons, that really nothing remains to be tried on your theory. You, of course, do not accept the court's interpretation of the contract. I don't want to make any suggestion, but it would seem to the Court that all that is left to you is your right of appeal. Is that your thought? The Court would be obliged to deny any judgment on the theory which you advance and intend to prosecute your case, as I understand you.

"Mr. Clemons: That is as I so understood the Court this morning.

"The Court: Yes.

"Mr. Clemons: Yes.

"Mr. Ray: If the Court please, in view of what has now transpired, we move the Court for a dismissal of this action.

"The Court: There were some matters that have got into the record since the last time that I conferred with you gentlemen. There were requests for admissions by the plaintiff which were responded to, and there were requests for admissions by the defendants,

and those admissions were in large denied. I don't know what posture that puts the case in at the moment.

"Mr. Ray: We answered all the interrogatories submitted to us pursuant to your Honor's order. Then we made request for admissions, some of them have been denied, but in view of what counsel now says those denials are of no consequence because he wouldn't put in proof upon the subject of those interrogatories anyway.

"The Court: That is your understanding, you would not have any proof to offer in respect to those interrogatories? Is that correct?

"Mr. Clemons: Our position is that in our case in chief we would offer no proof in connection with such matters. I am not saying that we would not offer rebuttal if the defense would interpose—submit proof. I am not foreclosing that, your Honor, in the event of trial, but on the case in chief, we would put in no information on those matters as to smelting costs.

"Mr. Ray: I would assume, your Honor, that if counsel elects to appeal from this case he would designate for inclusion in the record such matter as the record contains in which he thinks it would be beneficial to him, including our answers to his interrogatories.

"The Court: I would assume he would. What have you to say in response to counsel's motion to dismiss this case, if anything?

"Mr. Clemons: Your Honor, I have nothing to say with reference to his motion. As I understood, the Court this morning made some statement about nonsuit. I don't know if a motion to dismiss is in the nature of a nonsuit.

* * * * * * *

"The Court: Well, this order will be entered at this time. I think counsel has been afraid all the time that he might be in some way foreclosed in this case, that is from having a review.

"Mr. Clemons: I did want to save for ourselves the right of review on this particular point.

"The Court: This will certainly present it for you."

Following the foregoing the Court entered its judgment which is set forth at Page 189 of the Record. From the foregoing it seems apparent that only two issues emerge for decision:

1. Did the trial court correctly construe and interpret the contract and if so

2. Was it appropriate to enter a judgment of dismissal following pre-trial conference?

ARGUMENT

1. The Court Correctly Construed the Contract

Three and one-half years after this case had begun its costly and tedious course through the lower court, and on pre-trial hearing as noted in the foregoing Statement of the Case, counsel for appellant made certain statements in response to questions by the court which referred to requested admissions, which statements serve to high-light the issue here.

Asked whether he admitted that royalty payable on net smelter returns received by appellee from independent smelters had been paid to appellant, counsel for appellant said:

> "We have admitted that. That has never been in issue here. We admitted what they paid to us." (R. 201)
>
> "The second admission they requested, those were all items under No. 1, was that the net smelter returns computed by defendant Bradley Mining Company on all concentrates processed at the Yellow Pine Smelter were computed by defendant Bradley Mining Company on the same basis as net smelter returns were computed

by independent smelters to which like concentrates were shipped. That we deny." (R. 201)

Appellee had alleged in its answer that:

"Defendant alleges the amount of royalties payable to the plaintiff by the defendant as required by said agreement of December 31, 1941, has been computed as to concentrates treated in the Yellow Pine Smelter upon the basis of net smelter returns as defined in said agreement, which basis is the equivalent of the value of such concentrates on the mining property; that as to concentrates shipped to outside smelters the amount of royalties payable to the plaintiff by the defendant as required by said agreement has been computed upon the basis of the amount paid therefor by the purchaser less transportation charges. This defendant alleges that as a result of the construction and operation of the Yellow Pine Smelter large tonnages of low grade ores have become marketable, which ores, but for the construction of said smelter, would have had little or no value and other ores have become more valuable, and as a consequence plaintiff has been paid and will continue in the future to receive royalty payments far in excess of the royalties that would have been payable had the Yellow Pine Smelter not been constructed." (R. 46)

The following colloquy then occurred at the pre-trial conference:

"The Court: Just a moment. As regards this matter of computation on the royalties on the basis of the market value of the concentrates at the mine. I take it that the plaintiff has not admitted that you have paid the royalty on that basis.

"Mr. Ray: That is what we want to find out, if they do or do not.

"The Court: What about that Mr. Clemons?

"Mr. Clemons: I will have to admit that they paid us royalty. The basis upon which they have paid them, I am not prepared to admit that is the same basis that anyone else would pay. I don't know, so I cannot admit that. We know they have paid us money, yes, but as to how they have computed it, I don't think that we should be required to admit that is the proper and correct way of computing it, or that it is proper at all.

"Mr. Ray: How do you propose to prove your case then if you can't either admit or deny that our computations are right? The burden is upon you. How do you propose to present your case? We would like to know so we can meet it, if you have one.

"The Court: Do you consider you have no burden of going forward at all with that proof? You are asking a money judgment here.

"Mr. Clemons: That is right, your Honor." (R. 208-209)

After some further discussion counsel for appellant requested a recess until after noon, and when court reconvened, counsel stated that he had conferred with his associate counsel and was prepared to say that the theory stated by him (that appellant was entitled to recover upon the "net revenue" basis) notwithstanding the court's ruling to the contrary would be the theory upon which appellant would present the case and that they would not offer any evidence on any other theory. The court then said:

"The Court: I take it then, Mr. Clemons, that really nothing remains to be tried on your theory. You, of course, do not accept the Court's interpretation of the contract. I don't want to make any suggestion, but it would seem to the Court that all that is left to you is your right of appeal. Is that your thought? The Court would be obliged to deny any judgment on the theory

which you advance and intend to prosecute your case, as I understand you.

"Mr. Clemons: That is as I so understood the Court this morning." (R. 213, 214)

Appellant conceded that the contract meant that royalties on ores shipped to independently owned smelters should be settled for on the basis of the net proceeds received for such ores from such independent smelters.

Such proceeds of course represented the gross proceeds on ores shipped to such independent smelters and remaining after deducting their normal smelting charges.

Such charges consisted of base charge, percentage of metal value for which payment is made, penalties for impurities (and other items), are reflected in the exhibits attached to appellant's complaint and there is no dispute between the parties as to the meaning of normal smelting charges.

Appellant, however, asserts that the contract has a different meaning when attention is directed to ores processed in a smelter owned by the appellee and that with respect to such ores royalties are payable upon the basis of *gross* smelter returns—that is the amounts which would be paid by a smelter based on metal content of ores received by it without any deduction for normal smelting charges.

Appellant does not use the phrase "gross smelter returns" but on the contrary asserts that an equivalent basis must be applied in computing royalties payable—namely, that royalties must be computed upon the "net revenue basis", that is to say, without any allowance to the defendant for its normal smelting charges.

From the foregoing, it clearly appears that appellant had no complaint when royalties paid on ores shipped to independently owned smelters were paid on the basis of the

net proceeds received from such smelters notwithstanding that in arriving at the net proceeds so payable, such independently owned smelters deducted their normal smelting charges.

And it clearly appears that appellant had no thought of attempting to show that the payments made by appellee on account of royalties on ores processed at the Yellow Pine Smelter were one cent less than there would have been payable had such ores been shipped to independently owned smelters.

Yet appellant asserts that the court did not correctly construe the contract.

Appellant does not contend there was any obligation on the part of appellee to build a smelter or to operate a smelter; does not contend that it would have been entitled to receive one cent more than it in fact has received had the appellee not built and operated a smelter. But appellant, notwithstanding it in effect confesses that it has in no way been injured through the processing of ores in the Yellow Pine Smelter, asserts that the contract must be construed as entitling appellant to vastly greater royalties than it would have otherwise been entitled to receive because appellant was so ill-advised as to spend millions of dollars in the construction of a smelter and much more in its operation.

An examination of the wording of the contract will disclose that there is no basis for a construction leading to such an extraordinary result, nothing to indicate any such intent on the part of the parties when the contract was entered into.

To construe the contract as appellant would have the court do would necessarily require that the primary purpose of the parties be ignored; it would require the reading into the contract of language not therein contained, the injection into the contract of duplicate provisions covering

the same matter, and the refusal to give effect to certain of its terms.

The issue in question which the court below was called on to decide and which is now presented to this Honorable Court, may in the light of the foregoing be stated as follows:

> Does the ownership or control of a smelter determine whether royalties are payable upon *net* smelter returns or *gross* smelter returns under the contract which provides for the payment of royalties upon *net* smelter returns, *net* revenue, or *net* mint returns?

Implicit in appellant's contention is the assumption that the definition of net smelter returns applies only to what is received by appellee from an independently owned smelter; this requires the reading into the definition of net smelter returns the words "independently owned" so that the definition will read:

> "By *net smelter returns,* as used herein is meant the amount received from the *independently owned* smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said Smelter shall also be deducted."

This being done we have two bases for computing royalties on concentrates sold to a smelter—"net smelter returns" and "net revenue"—for net smelter returns received by appellee from an independently owned smelter are the purchase price of concentrates sold and are received on a sale of such concentrates (Mr. Oberbillig—president of appellant—at page 13 of his counter-affidavit, says he knows of no other meaning of the words "net smelter returns", R. 132).

Such bases are dollar wise identical but are labeled "net smelter returns" and "net revenue".

Why did the parties separately define net smelter returns and net revenue if they were one and the same? Of course, no such meaningless duplication was intended as a comparison of the wording of the three definitions "net smelter returns", "net revenue" and "net mint returns" discloses:

"Net smelter returns" is defined as the amount *received* for ores, etc., *shipped* to a smelter.

"Net revenue" is defined as the amount *paid* by any purchaser on a *sale*.

"Net mint returns" are defined as the amount *paid* by the United States Mint.

Note the contrast between the words *"received"* and *"shipped"* in the definition of net smelter returns and the words *"paid", "any purchaser"* and *"sale"* in the definition of net revenue.

Note that in defining net smelter returns it was expressly provided that *"the smelter will deduct its normal smelting charges."*

If the parties intended to refer only to independently owned smelters why did they insert this provision in the agreement? Such independently owned smelters are purchasers if ores or concentrates are shipped to them and they remit to appellee the amount of the net smelter returns, and what they will pay is determined by them.

Of course they would deduct their normal smelting charges,—both parties to the agreement were perfectly aware of that—and would deduct such charges whether as between the parties to this agreement it was or was not so agreed.

If it was necessary to provide that a purchaser, if a smelter, should *deduct its normal smelting charges* in determining what it would pay, why was not a like proviso inserted as to "any purchaser"—which term certainly did not exclude

a smelter purchaser? **Only if the parties had in mind a smelter owned or controlled by appellee could there have been reason for including such proviso, and with that in mind such proviso was imperative for otherwise there would have been no basis for computing net smelter returns by such a smelter.**

A case which we believe to be very much in point is that of *Armstrong v. Skelly Oil Co.,* (CCA 5th 1932) 55 F.2d 1066, wherein the Circuit Court upheld the right of an oil and gas Lessee which had erected a casing head gasoline extraction plant on the leased premises to deduct normal charges including depreciation and fair return on investment in computing the Lessor's royalty share, the Court saying in this connection at page 1068:

> *"Appellees were under no obligation to erect a plant to treat this gas. When they did so they were entitled to deal with the lessor the same as a stranger would have done.* Had the gas been sold to an extracting plant, the lessee, under the universal custom of the trade, would have received returns identically the same as those made by appellees.
>
> "The method used to ascertain the value of the gas taken is fair. It would not be just to settle with the seller of the gas at the market price for the full amount delivered. *That would leave nothing to cover shrinkage in extraction and the cost of manufacture, including overhead charges, and a fair return on the investment."*

The inherent weakness of appellant's claim that the appellee does not have the right to deduct normal smelting charges as to concentrates and minerals processed in its own smelter is illustrated by paraphrasing the language used by the California Supreme Court in the case of *Meyers*

v. Texas Co., 6 C.2d 610 (1936) 59 P.2d 132 at page 136, as follows:

> For the purpose of arriving at the intent of the parties, we can assume a situation where, if the items mentioned are not to be deducted as a part of the cost of processing the ores and minerals, the profits would not justify the Lessee in processing marginal, low grade, and unmarketable concentrates, as a result of which, under its contract, the plaintiff would receive no return, whereas if they are to be deducted, a fair return may inure to both.

It cannot be seriously doubted that the "principal purpose of the agreement" was to provide for the payment of a royalty of 5% of the *net* realizable value of the mine product, irrespective of how it was realized, and that it was not intended that either party should profit at the expense of the other, because, fortuitously the mine product was disposed of in any particular manner.

For the information of the Court we are citing the Idaho cases that state the Idaho rule with respect to the construction of contracts.

In the case of *Durant v. Snyder,* 65 Idaho 678, 151 P.2d 776 (1934), the Idaho Supreme Court states the rule as follows:

> "The intent of the parties to a written agreement, is, if possible, to be ascertained by the language as contained therein. (12 Am. Jur. pg. 745, sec. 227.) If the Court is unable to determine the meaning of the contract, however, from its terms, then evidence should be received to determine the meaning and intention. * * * And in construing a written instrument, where the language used is clear, certain and unambiguous the Court will give effect to the language employed according to its ordinary meaning. * * * The contract

is to be given effect according to its terms and the Court can neither substitute nor write a new contract."

And in the case of *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P.(2) 651, (1944) the Court said:

"In construing a written instrument to determine what is intended by it the court must examine the whole instrument and if the meaning is clear and unambiguous and involves no absurdity or contradiction, the contract must be enforced according to the plain import of the language used."

"The determination of the meaning and legal effect of such a contract is for the court alone (Mark P. Miller Co. v. Butterfield-Elder Co., supra; Messinger v. Cox, supra; First Nat. Bank v. Cruickshank, 38 Ida. 789, 225 Pac. 142; but if the court is unable to determine the meaning of the contract from its terms, it should then hear testimony of witnesses to determine the meaning and intention of the parties as expressed by the contract."

In the case of *Twin Falls Orchard and Fruit Co. v. Salsbury,* 20 Idaho 110, 117 P. 118 (1911), the Idaho Court said:

"This court just held in Schurger v. Mooreman, ante, p. 97, 117 Pac. 122, that in the construction of a contract the court should endeavor to arrive at the real intention of the parties, and if there is room for doubt as to its true meaning, the facts and circumstances out of which such contract arose should be considered and the contract construed in the light of such facts and circumstances, so that the intention of the parties to the contract may be ascertained, if possible, and given effect."

Because of the completely opposite views taken by the plaintiff and defendant as to the intent and meaning of the contract, and not because appellee considered it as a neces-

sary aid to enable the Court to construe the contract, appellee pleaded affirmative matter in its answer (R. 41, 43-50) and submitted with its motion for summary judgment the affidavit of John D. Bradley (R. 52-65) for the purpose of showing the facts and circumstances out of which the contract arose, for the consideration of the Court should the Court deem such extrinsic matter to be necessary.

To put the proposition in the language of the Idaho Supreme Court:

> *"Testimony thus introduced merely defines or translates the language of the instrument. It does not vary or add to the terms of the writing and does not fall within the parol evidence rule.* The testimony is admitted for the purpose of ascertaining not only the meaning of the words used, but the intention of the parties as expressed in the writing. *Here we are confronted with a dispute between the parties as to the meaning of certain language used in the contract. Conceding, but not admitting, that the words used are ambiguous and uncertain, and that different minds might well reach different conclusions as to their meaning, in such a situation evidence may be received to ascertain the real intention of the parties.* (Jones on Evidence, Vol. 2, 4th ed., sec. 455.)"
>
> *Stone v. Bradshaw,* 64 Idaho 152 at page 159, 128 P.2d 844 (1942).

The objects and purposes of a contract are a proper subject of inquiry by the Court. *Clarke v. Blackfoot Water Works, Ltd.,* 39 Idaho 304, 228 Pac. 326.

It is respectfully submitted that a construction of the contract which gives effect to such obvious intent of the parties, which takes account of all of the provisions of the contract, which does not require the reading into the contract of extraneous matter, nor result in meaningless dupli-

cation and which operates to give to the appellant all that it claims to have been entitled to receive had the ores been otherwise disposed of than by processing at the Yellow Pine Smelter, is the proper construction to be given the contract.

II. Judgment of Dismissal After Pre-Trial Conference Was Properly Rendered.

The trial court held the pre-trial conference in accordance with Rule 16 of the Federal Rules of Civil Procedure. Among the purposes of pre-trial conference as specified by the rules are:

(1) The simplification of the issues.

(3) The possibility of obtaining admission to fact or of documents which will avoid unnecessary proof.

(6) Such other matters as may aid in the disposition of the action.

In *McCarthy v. Lerner Stores Corporation,* 9 F.R.D. 31, (USDC D. of C. 1949) Judge Holtzoff states:

> "Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which relates to pretrial, provides that the Court shall make an order which recites the action taken at the pretrial hearing. This order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injuries.
>
> "(1) One of the chief purposes of pretrial procedure, and the principal usefulness of a pretrial order, is to formulate the issues to be litigated at the trial. The parties are bound by the pretrial order. They may not later inject an issue not raised at the pretrial conference. Otherwise the primary objective of pretrial procedure would be defeated.
>
> "It is assumed by the Court that at the pretrial counsel are as thoroughly familiar with the case—making as complete a disclosure as they would at the trial, and being as completely prepared—as they will be at the

trial. This is an unavoidable and inexorable duty that the existing Federal practice imposes on members of the bar. To say that parties are not bound by the pre-trial order is a misunderstanding of the purpose and the office of pretrial."

At the pre-trial conference the court announced that the issue of law raised by the pleadings and the motions was whether appellant was entitled to relief upon the "net revenue" provisions of the contract relied upon by appellant, with no allowance to appellee for smelter charges. The Court announced that he had theretofore construed the contract contrary to the contentions of the plaintiff and that his decision in that connection would be re-stated as a part of the pre-trial order. The trial court then gave plaintiff an opportunity to raise or suggest any other issues of law which might properly be reserved for trial. Plaintiff suggested no other issue of law but on the contrary unequivocably announced its purpose to adhere to the construction of the contract which had been theretofore rejected by the court. Thus there was no issue of law to be decided upon a trial.

The court then pointed out to plaintiff that it was seeking a money judgment and that the burden of proof was upon it. Counsel then stated that it would try its case just as if the court had sustained its construction of the contract. It would raise no issue of fact on any other theory, and would complete its case upon trial by proving the amounts received by appellee for smelter products sold and then deducting the cost of freight and sales commissions to find a basis for applying the 5% royalties. The amounts received by appellee for the sale of smelter products together with the freight charges and sales commissions were already a part of the record and before the court by admission of appellee.

It is obvious that if there had been a trial, plaintiff would have offered the contract in evidence, it would then have offered proof as to the amount received by defendant for the sale of products of the Yellow Pine Smelter, together with the freight costs and sales commissions, all of which was already in the record. Such evidence, under the court's construction of the contract, would have been inadmissible because of immateriality. An objection to the offer would have been sustained. Plaintiff would then have rested with nothing in evidence but the contract. In such a situation a motion to dismiss would have to be granted.

Upon the record it would have been idle and useless to set the matter down for trial. At the end of the pre-trial the only issue of law in the case had been settled and decided. No material issue of fact remained for decision. In such case an action should be dismissed upon pre-trial.

Decided cases upon the point support appellee's contention that since there was no genuine issue of law or fact remaining after pre-trial, it was proper for the court to enter judgment of dismissal.

Dismissal of the action was proper, when the court was informed by counsel for appellant that it would offer evidence only upon an issue upon which the court had ruled against appellant. In *King v. Edward Hines Lumber Co.*, 68 F. Supp. 1019, 1021 (D.C.D. Ore. 1946), Judge Fee said, in discussing the admissions by counsel at a pre-trial conference that limited the issues of the action to a single issue:

> "If the court cannot rely upon the admissions of counsel made in pretrial conferences, then that procedure has no validity. The court must be able to trust counsel's knowledge of the law and of the fact. If counsel should be mistaken as to both and yet stipulate to a fact, or to a ground of liability, or that he has no claim under a specific theory of law, then no judgment

founded upon a pretrial order or conference would be valid."

In the above case the court found that a single issue controlled the action, and when this issue was determined adversely to plaintiff, the court entered a final order of dismissal.

It is proper for the court to rule on questions of admissibility of evidence at a pre-trial conference.

United States v. Certain Tracts of Land in Los Angeles County, Cal., et al, 57 F. Supp. 739 (D.C.S.D. Calif. 1944);

Rivera v. American Export Lines, Inc., et al, 13 F.R.D. 27 (USDC SDNY 1952);

United States v. Certain Parcels of Land in Los Angeles County, et al, 63 F. Supp. 175 (D.C. S.D. Calif. 1945).

Where a pre-trial order has eliminated an issue from an action, no finding on that issue is necessary. In *Fanchon & Marco v. Hagenbeck-Wallace Shows Co.,* 125 F 2d 101, 104 (CCA 9th 1952) the court held:

"By a pre-trial order dated November 25, 1940, this issue was excluded from the case, thus obviating the need of a finding thereon. There is, therefore, no merit in appellant's contention that, for lack of such a finding, the judgment should be reversed."

A final judgment of dismissal was a proper order at the end of this pre-trial conference. In *Silvera v. Broadway Department Store,* 35 F. Supp. 625, 627 (D.C. S.D. Calif. 1940) the court held:

"The court has power under Pre-trial Rule No. 16 to dismiss when the facts submitted and proof show no cause of action."

for trial. In effect, and in fact, appellant invited a dismissal.

Appellant also ignores completely the scope and function of a pre-trial. Thus the general authorities and decisions cited by appellant are not in point.

CONCLUSION

To construe the contract in suit in harmony with the claim of appellant and permit recovery of royalties upon amounts received for smelter products sold with no allowance to appellee for the normal smelting charges and costs of the Yellow Pine smelter, would require deletion from the contract of the net smelter and normal smelting cost provisions, and would at the same time unjustly enrich appellants.

To have held the case over after pre-trial conference for a formal trial would under the circumstances set forth above, have been useless and idle and contrary to the spirit and purpose of the pre-trial procedure.

We respectfully submit therefore that the judgment of the trial court should be sustained.

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